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LABOR RELATIONS

JUL 15 91

JMS	✓			PWK		
RL				EJK	✓	
CL				LN		
HW				RJS	✓	
WMS				CIA		
WOM				KWC		
OSW				OLM		

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4370

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 27

Case No. 29

STATEMENT OF CLAIM

1. The Carrier violated the provisions of the current Agreement when it improperly removed Mr. P. Ramirez' Foreman and Assistant Foreman's seniority when Claimant's actions were based on the instructions Claimant received from the Carrier's officers.

2. The Carrier shall now be required to restore Claimant's seniority in the classes of Foreman and Assistant Foreman and compensate Claimant for any wage loss suffered as a result of the above referred to violation.

F I N D I N G S

The Claimant established seniority as a Trackman effective with his hiring date of June 26, 1978. On July 27, 1981, he acquired seniority as an Assistant Foreman and Track Foreman. On December 15, 1989, while working as Trackman, he was placed on force reduction and subsequently bumped into a Trackman's position commencing December 27, 1989.

As of January 1, 1990, Surfacing Gang SC-11 was being formed at Fort Worth. Pending completion of the bulletining period, an employee junior in Foreman seniority to the Claimant was placed in the SC-11 Foreman position. When the roadmaster realized his error, he notified the Claimant that he was to fill the Foreman position on Surfacing Gang SC-11 as of January 4. The Claimant refused the placement, moving to another Foreman's position instead. Upon these events, the Carrier then determined that the Claimant had forfeited his Foreman seniority by failure to report as directed for the SC-11 Foreman position.

The Carrier relies on Rules 12 (g) and 14 as the basis for its determination. These Rules read in pertinent part as follows:

Rule 12:

Temporary Assignment (g): New positions and vacancies undergoing bulletining and assignment, also temporary vacancies of less than thirty (30) calendar days duration which are to be filled, shall be assigned in the following order:

1. To the senior unassigned employee of the class whether working in a lower class or furloughed account force reduction.
2. To the senior employee awaiting promotion in accordance with the provisions of Rule 10.
3. By promotion of the senior employee in the next lower class or classes in accordance with the provisions of Rule 10.

Rule 14 - Recall to Service

When forces are increased, or vacancies occur, employees who have been cut off in force reduction or forced to displace in a lower class, shall be recalled to service in the order of their seniority.

Off in force reduction employees shall be notified of their recall to service by personal contact or in writing at their last address of record and must report for service within fifteen (15) calendar days from the date notice of recall is received.

Employees failing to respond to recall to service under the provisions of this rule shall forfeit their seniority in the class to which recalled.

Positions may be filled temporarily pending the return to service of a recalled employee by the nearest qualified employee holding seniority rights in the class available without delay to the work.

The Board finds that the Carrier has properly applied Rule 12 (g) in this instance. The SC-11 Foreman position was a temporary assignment, as defined by Rule 12 (g). The Claimant was "the senior unassigned employee of the [Foreman] class . . . working in a lower class", although for several days he was mistakenly not recognized as such.

Rule 14, on which the Carrier also relies, concerns principally "recall to service" of employees cut off in force reduction, but it also covers employees "forced to displace in a lower class". The Claimant had been "forced to displace" on December 15, although he displaced from one Trackman position

to another. Whether the forfeiture of seniority referred to in Rule 14 is applicable in this situation is open to question.

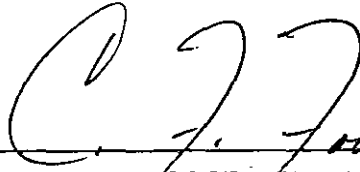
Suffice it to say that the Claimant improperly refused to comply with the placement on January 4, 1990, as required by Rule 12 (g). Adverse consequences to his status thereafter are of his own responsibility. Given all the circumstances herein, however, the Board finds that permanent loss of seniority rights is not warranted. The Award will provide that the Claimant's seniority rights as Foreman and Assistant Foreman be restored to their original date. There is, however, no basis for the granting of back pay.

A W A R D

Claim sustained to the extent provided in the Findings. The Carrier is directed to put this Award into effect within thirty (30) days of the date of this Award.



HERBERT L. MARX, JR., Chairman and Neutral Member



C. F. FOOSE, Employee Member



R. J. SCHNEIDER, Carrier Member

NEW YORK, NY

DATED: